STATE OF MICHIGAN

COURT OF APPEALS

FRANK VELEY, as trustee of the FRANCIS VELEY TRUST, Plaintiff-Appellant, v ROB S. JANNEY and DEBRA L. RICHARDS, Defendants-Appellees.	UNPUBLISHED May 10, 2011 No. 297907 Schoolcraft Circuit Court LC No. 2009-004173-CH

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

In this lawsuit involving a dispute between adjacent landowners, plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition and settling this boundary line dispute in their favor. For the reasons stated below, we agree with plaintiff that summary disposition should not have been granted. We reverse and remand for further proceedings consistent with this opinion.

When plaintiff bought his parcel in 1995, a previous owner told him he had the land surveyed and had placed concrete markers and planted trees on what he had supposed were the property lines. The realtor showed plaintiff where the property lines purportedly were. Plaintiff did not realize that a garage, a well, and a shed existing on the east edge of the property were encroaching on the true property line until defendants purchased the vacant parcel to the east in 2007. At that time, defendants had a survey done that showed that plaintiff's driveway, garage, well house, and shed encroached on their property. Plaintiff subsequently ordered his own survey, which confirmed defendants' survey.

In his complaint, plaintiff claimed ownership to the disputed strip of land under the doctrine of repose, or, alternatively, that he had taken title by adverse possession. Defendants moved for summary disposition, arguing that the doctrine of repose did not apply because there was no evidence that the earlier survey actually existed or, if it had, where it had established the property lines. Defendants also argued that plaintiff could not have taken title by adverse possession because he admitted he only intended to take title to the true property line and because the vacant nature of defendants' land meant they were not aware of any hostile possession.

The trial court concluded that because no earlier survey had been produced and there was no evidence of one, plaintiff's claim based on it had to fail.[1] The court also found plaintiff's adverse possession claim was without merit, reasoning in part that because defendants' property had been vacant until the time they purchased it, the previous owners had no notice of the alleged "hostility" of plaintiff's possession. The court concluded that plaintiff's use of unenclosed vacant land was insufficient to be hostile use without notice to the owner. The court also found that plaintiff had acknowledged his intent was to own to the true property line.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Plaintiff correctly states that a claim of adverse possession is not necessarily defeated simply because the possessor is mistaken as to the true location of a boundary line. *Gorte v Dep't of Transp*, 202 Mich App 161, 170; 507 NW2d 797 (1993). However, adverse possession in that event still requires the possessor to possess the property with the intent of holding to a particular boundary irrespective of the true property line. *Id.*, see also *Dubois v Karazin*, 315 Mich 598, 602-605; 24 NW2d 414 (1946). In *Gorte*, this Court found that the plaintiffs were mistaken as to the boundary line and held to what they believed the true boundary line to be, but *also* intended to hold to that boundary line irrespective of where the true boundary was. Therefore they "[fell] within the second group of adverse possessors in that they respected a line that they believed to be the true boundary, but which proved not to be the true boundary." *Gorte*, 202 Mich App at 171.

The factual situation here is much murkier. Certainly, it appears that plaintiff genuinely believed the boundary line to be where his predecessor in interest located it. Plaintiff commissioned a survey in the apparent belief that it would vindicate his view of where the true boundary line was located. And the trial court was undoubtedly, and reasonably, persuaded that defendants' eminently rational interpretation of plaintiff's fourth answer to defendants' first request for admissions showed that plaintiff intended only to own to whatever the true property line was. However, we are not persuaded that defendants' interpretation of this answer is the only plausible one. That answer was as follows:

> 4. Admit that Plaintiff herein, before being informed that there was a survey problem, never intended to take property pursuant to adverse possession, but only intended to occupy property to what he thought was his true boundary line.

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[1] Plaintiff abandoned the repose issue at oral argument.

> ANSWER: Number 4 is denied; Plaintiff intended to occupy the property to the line he claims is the property line whether it be by adverse possession or under any other legal theory of ownership; property to the line so claimed is the property Plaintiff purchased, and Plaintiff had been shown the lines and the boundary markers by previous owners Albert and Marie Kokesh and the lines now claimed are the lines shown to Plaintiff by Kokeshes.

This is not a model of clarity. Furthermore, it is noteworthy that there were structures on plaintiff's property that were already encroaching over the true boundary line when he purchased the property. We conclude that, given the already-encroaching structures and the ambiguous answer, there is a genuine question of fact as to whether plaintiff intended, as did the plaintiffs in *Gorte*, to own to a particular boundary even if that boundary turned out not to be the true boundary as believed. Consequently, summary disposition, though understandable, should not have been granted.

Plaintiff finally argues that the trial court erred in concluding that defendants or their predecessors in title must acknowledge or recognize plaintiff's hostile actions. Given that defendants' 100-b7-170 foot parcel is located between other similarly-sized parcels, we are uncertain that the "unenclosed and wild lands" doctrine applies here. But in any event, that doctrine has been applied only in cases where a prescriptive right of passage is sought. See, e.g., *Ruggles v Dandison*, 284 Mich 338; 279 NW 851 (1938); *Du Mez v Dykstra*, 257 Mich 449, 451; 241 NW 182 (1932). In such cases, the burden of proof is higher because the open and hostile use is less apparent, being of a transient nature, and so actual notice is harder to prove. No unusual standard applies here.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher